No. 24-128

IN THE

Supreme Court of the United States

CAF DOWLAH,

Petitioner,

v.

AMERICAN ARBITRATION ASSOCIATION (AAA),
CITY UNIVERSITY OF NEW YORK (CUNY),
PROFESSIONAL STAFF CONGRESS (PSC-CUNY),
and DEBORAH GAINES,

Respondents.

On Petition for a Writ of Certiorari to the United States Supreme Court for State of New York Court of Appeals

BRIEF FOR RESPONDENT DEBORAH GAINES

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QUESTIONS PRESENTED

1. Whether the Petitioner has set forth any basis for a grant of Writ of Certiorari, where the entire action has no merit in law or fact, and no showing has been made to establish that the issues raised are of public importance sufficient to warrant review of this Court.

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INTRODUCTION

Respondent Deborah Gaines (hereinafter "Arbitrator Gaines") submits this brief in opposition to the Petition for Writ of Certiorari, initiated by Petitioner Caf Dowlah (hereinafter "Petitioner"). This matter stems from an arbitration award, dated March 7, 2019, that followed an arbitration proceeding addressing a dispute between the Petitioner, Caf Dowlah, and his former employer, defendant-respondent the City University of New York (hereinafter "CUNY"). Respondent herein, Arbitrator Deborah Gaines (hereinafter "Arbitrator Gaines") is an arbitrator with the American Arbitration Association, who presided over the arbitration proceedings that resulted from CUNY's termination of Petitioner's employment, pursuant to a Collective Bargaining Agreement (hereinafter the "CAB").

Following the arbitration hearings, wherein Petitioner was represented by counsel who presented evidence in support of Petitioner's position, Arbitrator Gaines issued the arbitration award at issue on March 7, 2019, finding that CUNY had just cause for its termination of Petitioner's employment. Petitioner challenged the arbitration award, *via* a Petition pursuant to Article 78 of the New York Civil Practice Law and Rules, asserting claims against Arbitrator Gaines, arguing that Arbitrator Gaines' decision as arbitrary and irrational. The Petition was denied and Arbitrator Gaines' motion to dismiss the Petition was granted. Petitioner

commenced the within action, repeating his challenges to Arbitrator Gaines' determination, and the State of New York Supreme Court found that the within action was barred by the doctrines of Res Judicata and collateral estoppel, and in any event, the claims against Arbitrator Gaines are barred by the arbitral immunity doctrine. The Supreme Court's decision was affirmed by the New York State Court's Appellate Division, and leave to appeal to the New York State Court of Appeals, New York State's highest court, was denied.

As is clear even from the issues articulated in Petitioner's papers, there is no legal question presented that warrants this Court's review. Petitioner has articulated no grounds upon which this Court should grant Writ of Certiorari to review the New York State Court's dismissal of Petitioner's claims.

STATEMENT OF THE CASE

This matter has its genesis on arbitration proceedings held in February 2019. At issue in the proceedings was Petitioner's employment. Petitioner had been an Assistant Professor of Economics at the Department of Social Sciences of Queensborough Community College (hereinafter "QCC"), a college part of CUNY. In 2009, Petitioner was promoted to Associate Professor. In or about 2014, Petitioner applied for a promotion to full professor, but his application was denied in July 2014. Petitioner grieved the denial of the promotion.

During the arbitration proceedings, it was demonstrated that Petitioner engaged in multiple unprofessional and inappropriate communications throughout a period of several years, including statements and emails that were considered threatening to his colleagues. This included a berating email sent by Petitioner to CUNY's then-Interim Acting Vice President, in September 2016.

Petitioner grieved that suspension, resulting in an arbitration with a non-party arbitrator, Arbitrator Biren, who determined that there was just cause for the disciplinary action. The penalty was reduced to a written reprimand, under the principles of progressive discipline. As a result of that disciplinary action, Petitioner received a warning from the President of QCC that any additional incidents of failure to maintain proper communications with other members of the college community would lead to further discipline. Despite this warning, Petitioner continued with disparaging emails and communications to members of the college community.

Petitioner was denied full professorship, resulting in an agreement between CUNY and Petitioner's union, Professional Staff Congress ("PCS"), to be reconsidered for full professorship by a select faculty committee. A faculty committee of three CUNY professors was formed to review Petitioner's candidacy. In May 23, 2018, the faculty committee voted against recommending Petitioner for the promotion. Petitioner responded to the decision by

the select faculty committee by sending a threatening email to all three members.

Following the threatening email and the recipients' concerns for their safety, CUNY initiated disciplinary charges against Petitioner and ultimately terminated Petitioner's employment. Petitioner appealed the termination and the issue was submitted to arbitration, pursuant to the collective bargaining agreement (CBA) between CUNY and PSC. Petitioner, represented by counsel, and CUNY jointly selected Arbitrator Gaines to preside over the proceeding.

An arbitration hearing was held on February 28, 2019, during which Petitioner was represented by counsel. Arbitrator Gaines issued the arbitration award on March 7, 2019, finding that CUNY had just cause to terminate Petitioner's employment.

Petitioner challenged the arbitration award *via* a Petition pursuant to Article 75 of the New York Civil Practice Law and Rules, in Supreme Court, New York County (Index No. 653101/2019), seeking an order (a) vacating the arbitration award; (b) finding that Arbitrator Gaines exceeded her authority as an arbitrator; (c) finding that Arbitrator Gaines violated strong public policy favoring the retention of teachers despite incidents of misconduct. The Article 75 Petition claimed that Arbitrator Gaines' arbitration award was irrational, arbitrary, excessive and shocking to a sense of fairness, and excessive in its penalty. Petitioner also argued that the arbitration award was issued as a

result of fraud, that Arbitrator Gaines exceeded her authority, and that the award violated public policy.

In a Decision and Order dated September 10, 2019, the State Supreme Court of the State of New York, New York County, dismissed the Article 75 Petition, finding that Arbitrator Gaines' findings and determination were warranted, and that the decision was deliberative, comprehensive, well-reasoned, and supported by the record.

Petitioner appealed the September 10, 2019 Decision and Order, to the New York State intermediate appellate court, the Appellate Division, First Department. The Appellate Division found that Arbitrator Gaines' findings were supported by the record, and not arbitrary, capricious or irrational. *Matter of Dowlah v. City Univ. of N.Y.*, 189 A.D.3d 533 (1st Dept. 2020). The Appellate Division further found that "[t]he record also reveals that petitioner received due process in that he was represented by counsel at the hearing and it had the opportunity to call and cross-examine witnesses, present documentary evidence and make arguments. His assertion that the arbitrator was biased against him was not supported by any evidence in the record." *Matter of Dowlah,* at 534-535.

Acting *pro se*, Petitioner initiated the within action also in New York State Supreme Court, again challenging the arbitration award. In a Decision and Order dated December 21, 2022, the Supreme Court, New York County, held that Arbitrator

Gaines acted within the scope of the arbitral process when she presided over this issue. The court went on to find that the claims against Arbitrator Gaines must be dismissed with prejudice, as she was entitled to absolute immunity from liability for acts committed in her capacity as an arbitrator.

Petitioner appealed from the Decision and Order entered December 21, 2022 to the New York State intermediate appellate court, the Appellate Division, First Department. In a Decision and Order entered November 9, 2023 Decision, the Appellate Division agreed with the trial court's finding that the claims against Arbitrator Gaines were barred by the doctrines of *res judicata* of collateral estoppel. *Dowlah v. American Arbitration Assn.*, 221 A.D.3d 426 (1st Dept. 2023). The Appellate Division agreed that the prior action and appeal also sought to set aside the arbitration award, based upon the arguments that the arbitration proceedings were improper and that the findings of Arbitrator Gaines were allegedly unsupported by the record, and thus arbitrary and capricious.

Petitioner then proceeded to seek leave to appeal from the State's highest Court, the New York Court of Appeals. Petitioner argued that the Appellate Division failed to recognize his allegations of judicial misconduct on the part of the justices ruling below; that the lower courts misapplied the doctrines of *Res Judicata* and collateral estoppel; and that the lower courts improperly applied Arbitral Immunity.

Leave to appeal to the State of New York Court of Appeals was denied. *Dowlah v. Am.Arbitration Ass'n*, 41 N.Y.3d 910 (2024).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional provisions that apply to this matter involving state-based claims as it pertains to the claims against Arbitrator Gaines.

ARGUMENT

THERE IS NO BASIS UPON WHICH TO GRANT WRIT OF CERTIORARI

Pursuant to Rule 10 of this Court, whether to grant Writ of Certiorari is a matter of Court discretion. Among the factors to be considered in making a determination of whether to grant Writ of Certiorari are: (a) whether the underlying Court of Appeals' decision is in conflict with other circuit Court of Appeals on an important matter; (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

In fact, this Court has held that a principal purpose for which certiorari jurisdiction is used by this Court is to resolve conflicts among the United States Courts of Appeals, and that of state courts. *Braxton v. United States*, 500 U.S. 344 (1991). Moreover, Certiorari is not granted unless the matter involves principles that are of public importance. *Rice v. Sioux City Memorial Park Cemetery*, 75 S. Ct. 614 (1954).

The Petition here does not meet this Court's criteria for consideration governing review on Certiorari, as required by Court Rule 10. No aspect of the issues involved in this matter are in the character of the reasons the Court considers in granting petitions for Writ of Certiorari.

A. There is No Conflict Between Any Provision of the Federal Arbitration Act and this Court's Precedent, and New York State Arbitral Immunity

Petitioner argues that the New York State Courts misinterpreted and misapplied the doctrine of arbitral immunity, resulting in absolute immunity to Arbitrator Gaines, and that there is a conflict between eh Federal Arbitration Act and the state-based arbitral immunity.

Petitioner fails to recognize that the Federal Arbitration Act is inapplicable to the issues in this matter. This matter involves solely state-based claims. The Federal Arbitration Act preempts state statutes as to transactions affecting interstate

commerce. *Highland HC, LLC v. Scott,* 113 AD3d 590, 592-593 (2014); *Citizens Bank v. Alafabco, Inc.*, 539 US 52, 56, 123 S Ct 2037, 156 L Ed 2d 46 (2003); *Perry v. Thomas*, 482 U.S. 483 (19987); *N.J.R. Assoc. v. Tausend*, 19 N.Y.2d 597 (2012).

Here, there is no allegation that any transaction at issue involved interstate commerce. This matter arises out of an arbitration clause within the CBA, in which Petitioner agreed to submit disputes arising out of his employment with CUNY to arbitration within the State of New York. The employment at issue was entered into within the State of New York. Petitioner has confirmed in his papers that is a resident of New York State. The employment that gives rise to the claims was with a New York State entity, CUNY. Petitioner has not presented any aspect of his employment contract which was to be performed outside of New York State, or which involved interstate commerce. *See, e.g., Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956).

As such, the New York State doctrine of arbitral immunity was properly applied, (*see, e.g. Jacobs v. Mostow*, 69 A.D.3d 575 (2d Dept. 2010). The Federal Arbitration Act does not preempt New York Court's application of arbitral immunity. But, in any event, New York State's application of the doctrine of arbitral immunity is consistent with the Federal Arbitration Act and the Federal Courts' application of the doctrine. In discussing the public policy behind the application of the arbitral im-

munity, the Sixth Circuit Court of Appeals found as follows:

> As with judicial and quasi-judicial immunity, arbitral immunity is essential to protect the decision-maker from undue influence and protect the decision-making process from reprisals by dissatisfied litigants. Federal policy, as manifested in the Arbitration Act and case law, favors final adjudication of differences by a means selected by the parties. *See* 9 U.S.C. §§ 2, 3, 4; *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960); *Rhine v. Union Carbide Corp.*, 343 F.2d 12, 16 (6th Cir. 1965) (labor arbitration). *Accord*, *Corey v. New York Stock Exchange*, 493 F.Supp.51 (W.D. Michigan 1980);, *supra*, 56; I. & F supra, 150. Because federal policy encourages arbitration and arbitrators are essential actors in furtherance of that policy, it is appropriate that immunity be extended to arbitrators for acts within the scope of their duties and within their jurisdiction. *Corbin v. Washington Fire & Marine Ins. Co.,* 278 F.Supp. 393, 396-397 (D.S.C. 1968),; *Hill v. Aro Corp.*, 263

F.Supp. 324, 326 (N.D. Ohio 1967). The extension of immunity to arbitrators where arbitration is pursuant to a private agreement between the parties is especially compelling because arbitration is the means selected by the parties themselves for disposing of controversies between them. By immunizing arbitrators and their decisions from collateral attacks, arbitration as the contractual choice of the parties is respected yet the arbitrators are protected. Arbitrators have no interest in the outcome of the dispute and should not be compelled to become parties to that dispute. *Tamari v. Conrad*, 552 F.2d 778, 780 (7th Cir. 1977). 'Individuals cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit.' *Tamari*, *supra*, 781. *Accord*, *Raitport v. Provident National Bank*, 451 F.Supp. 522, 527 (E.D.Pa. 1978).. An aggrieved party alleging a due process violation in the conduct of the proceedings, fraud, misconduct, a violation of public policy, lack of jurisdiction, etc., by arbitrators should pursue remedies against the "real" adversary through the appeal process. To allow a collateral attack against arbitrators and their judgments would also emasculate the appeal provisions of the federal Arbitration Act. 9 U.S.C. §§ 9, 10. For these reasons we

> believe that arbitral immunity is essential to the maintenance of arbitration by contractual agreement as a viable alternative to the judicial process for the settlement of controversies and must be applied in this case.

Corey v. New York Stock Exchange, 691 F.2d 1205, 1211 (6th Cir. 1982).

The New York State courts' finding that the doctrine of arbitral immunity shields Arbitrator Gaines from the claims asserted is squarely within the New York State and Federal Courts' application of the immunity, and consistent with the underlying policy considerations. *Corey v. New York Stock Exchange, supra.*

Petitioner's citation to *Butz v. Economou*, 438 U.S. 478 (1978) is misguided, at best. *Butz v. Economou*, *supra*, involved the issue of whether federal officials in the executive branch enjoyed personal absolute versus qualified immunity from claims arising from their alleged violations of citizen's constitutional rights. No federal officials were involved in the arbitration proceedings at issue here. In any event, in *Butz*, *supra*, this Court held that the federal officials were entitled to arbitral immunity.

To the extent Petitioner seems to argue that the arbitration clause within the CBA was unconscionable, such argument is inapplicable to Arbitrator Gaines, who has no involvement in the drafting of the CBA, nor Petitioner's participation in same.

Petitioner has not presented a legal question that warrants review from this Court with respect to the New York State Court's finding that the arbitral immunity shielded Arbitrator Gaines from Petitioner's claims.

B. There is No Basis for this Court's Review of the State Court's Application of State-based Doctrines *Res Judicata* and Collateral Estoppel

Petitioner has not presented any basis upon which this Court should review the New York State Court's application of the doctrines of *res judicata* and collateral estoppel. Petitioner does not argue that the underlying decisions were not consistent with the proper application of these doctrines. Rather, Petitioner's intends to ask this Court to "revisit" the doctrines of *res judicata* and collateral estoppel because it may result in adverse consequences.

Petitioner does not present any conflict between the New York State Court's application of these doctrines and the Federal Courts' precedent.

Petitioner relies on *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp, Inc.*, 590 U.S. 405 (2020), apparently for the proposition that a subsequent action is not barred under issue preclusion doctrines where the two litigations challenge different conduct and raised different claims. However, Petitioner's interpretation of *Lucky, supra*, overlooks the fact that the matter involved different trade-

marks, different legal theories, and different conduct occurring at different times. This Court found that the case law does not support preclusion where the two actions at issue lacked a common nucleus of operating facts. *Lucky, supra*, at 406.

Here, Petitioner's first action and current action both arise out of the single arbitration proceeding held in February 2019, and both share a common nucleus of operating facts. *Lucky, supra*, at 406. The State Court's findings were consistent with New York precedent. For instance, the New York State Court of Appeals held in *O'Brien v. City of Syracuse,* 54 N.Y.2d 353, 357 (1981), that all claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. Similarly, New York maintains that *res judicata* applies to preclude issues that were raised, as well as issues that could have or should have been raised in the prior proceeding. *Nationwide Mut. Ins. Co. v. U.S. Underwriters Ins. Co.*, 151 A.D.3d 504 (1st Dept. 2017); *Board of Managers of Windridge Condos. One v. Horn*, 234 A.D.2d 249 (2d Dept. 1996).

The Petitioner has not put forth any basis upon which this Court should review the application of the doctrines of *res judicata* and collateral estoppel. Therefore, to the extent Petitioner seeks that this Court overturn long-established principles of issue preclusion, in the form of res judicata or collateral estoppel, Petitioner has not presented any basis for such a proposition. The application of issue preclusion doctrines by the State Courts was con-

sistent with well-settled jurisprudence throughout New York State courts.

CONCLUSION

It is respectfully submitted that, for the aforementioned reasons, the petition for Writ of Certiorari should be denied.

Dated: Valhalla, New York
September 4, 2024

Respectfully Submitted,

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